88-1149 (1)

No.

Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CESSNA AIRCRAFT COMPANY,
Petitioner,

VS.

MERILYN W. BUTCHER, MARTHA J. NOBLE,
CAROLYN S. DURBIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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105 pp

QUESTIONS PRESENTED

1. Whether the plain language of Federal Rule of Civil Procedure 56 governing summary judgment mandates that reviewing courts insure finality by considering only those matters brought to the attention of the trial court at the time of hearing as some circuits have held, or whether it allows reviewing courts to consider new issues presented for the first time after entry of judgment as other circuits have held?

2. Whether the Fifth Circuit contravened this Court's opinions in *Celotex* and *Anderson* by allowing a non-moving party to oppose a summary judgment motion by resort only to the pleadings and by basing its reversal of a summary judgment motion on non-material factual issues?

LIST OF PARTIES

The only parties to the proceeding below are those noted on the caption of this petition. The parent companies, subsidiaries or affiliates of petitioner required to be listed pursuant to Rule 28.1 are listed on the Application for Extension of Time to File Petition for Writ of Certiorari.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Cessna Aircraft Co., (hereinafter "Cessna"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 27, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 850 F.2d 247 and is reprinted in the Appendix hereto, p. A-1, *infra.*

The decision of the United States District Court for the Southern District of Mississippi (Gex and Russell, JJ.) is reported at 668 F.Supp. 569 and is also reprinted in the Appendix hereto, p. B-1, *infra.*

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1332, the respondents brought this suit in the Southern District of Mississippi. On September 10, 1987, the Southern District entered an order granting petitioner's motion for summary judgment. On October 27, 1987, the Southern District denied respondents' motion to reconsider.

On respondents' appeal, the Fifth Circuit on July 27, 1988, entered its judgment and opinion reversing the Southern District and remanded the case to the district court for further proceedings. A petition for rehearing was filed, and the Fifth Circuit entered an order denying the petition on August 29, 1988.

On November 17, 1988, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including January 9, 1989.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Fed. R. Civ. P. 56. Summary Judgment.

The full text of the rule is reprinted in the Appendix, p. C-1, *infra*.

STATEMENT OF THE CASE

On June 19, 1982, a 1979 Cessna aircraft crashed just after takeoff at the Gulf Park Airport in Ocean Springs, Mississippi. (R. B-2; N-2; and D-2[1]) Lee Butcher was seated in the left front

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[1] The record on appeal is numbered separately for each of the three cases. Civil Action Number S85-0456(R), Merilyn W. Butcher, begins with Volume 1, and references to that portion of the record will be designated "B- ". The record for Civil Action Number S85-0510(R), filed by Martha J. Noble, begins at Record Volume 7, and will be referred to throughout this brief as "N- ". The record pertaining to Civil Action Number S86-0602(GN), filed by Carolyn Sue Durbin,

seat, Ronald Durbin was seated in the right front seat, and Evarist Noble was seated in the rear seat. (R. B-3; N-2, 3; D-2) All occupants were killed in the accident.

The only witness to the crash was an experienced pilot who observed that the crash was due to an attempted stunt maneuver on takeoff. (R. B-983-84; S.R. 1, 30; B-996-97; B-1016)

Respondents (the surviving spouses of the three occupants of the aircraft) brought suit in Mississippi state court against the estates of the other occupants as well as the owner and the operator of the airplane. (R. N-306; B-784) Mrs. Butcher alleged that Durbin was flying the airplane and was negligent; (R. B-785-86) Mrs. Durbin alleged that Butcher was flying the airplane and negligently performed a stunt maneuver; (R. D-188) and Mrs. Noble alleged that either Durbin or Butcher negligently performed a stunt maneuver. (R. N-308-09) All three plaintiffs also joined Gulf Park Aviation, the operator of the airplane, and two of the plaintiffs joined Janet Green, owner of the airplane, on theories of vicarious liability and negligent maintenance.

All three state court actions were eventually settled, with each respondent receiving $75,000 from Gulf Park Aviation. (R. B-1102; S.R. 1, 33; D-436; S.R. 3, 35; N-657; S.R. 2, 34) As operator, Gulf Park was vicariously liable regardless of who was flying the aircraft. In apparent contemplation of the instant action, the settlements expressly reserved respondents' right to pursue a suit against Cessna. (R. B-170-71)

Following the settlement, respondents sued Cessna in federal district court. (R. B-1; N-2, 3; D-1) Jurisdiction was premised on diversity of citizenship. 28 U.S.C. § 1332. In the federal court action, respondents alleged a totally different and contradictory theory for the accident. Under this new theory, respondents alleged that the left front seat, occupied by Butcher, was defective and slipped back during takeoff causing the aircraft to stall and crash. (R. B-1; N-2, 3; D-1) The district court, acting through both judges to whom the cases were assigned, granted summary

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begins at Record Volume 10, and will be referred to as "D- ". References to the four-volume Supplemental Record will be designated by the volume and page.

judgment for Cessna. The court held that because respondents settled their state suits based upon their complaints and allegations made in state court which were factually inconsistent with their subsequent allegations in federal court, the federal action was barred by the Mississippi doctrine of election of remedies or judicial estoppel. *Butcher v. Cessna Aircraft Co.,* 668 F.Supp. 569 (S.D. Miss. 1987). No counter-affidavits or other factual evidence was submitted by respondents in opposition to Cessna's summary judgment motions.

Respondents then filed a petition for rehearing, attaching affidavits from their attorneys in an effort to show they were unaware of the possibility of a seat defect when they filed their state complaints. (R. B-1207; N-758; D-542) The district court refused to consider this new evidence stating:

> Because we believe that Federal Rule of Civil Procedure 56 requires that the parties present evidence which they consider to be relevant and indicating a genuine issue of material fact *before* a determination of summary judgment is made, we will not consider the affidavits and exhibits submitted by the plaintiffs in support of their motion to reconsider.

(R. B-1928; N-811; D-595) (emphasis added). However, upon denying the motion, the court noted that the new affidavits, even if considered, would not have changed the court's position. (R. B-1928; N-811; D-595)

The Court of Appeals for the Fifth Circuit reversed, basing its opinion on the post-decisional affidavits filed by the attorneys and on the appellate court's erroneous view that the date of filing of the first lawsuits, as opposed to the date of settlement, was, for the purposes of applying the judicial estoppel/election of remedies theory, the relevant time when respondents elected their remedy. *Butcher v. Cessna Aircraft Co.,* 850 F.2d 247 (5th Cir. 1988). The court of appeals mistakenly based its decision on the "widows' affidavits" when in fact the only affidavits offered by plaintiff were those of the plaintiffs' *attorneys. Id.* at 250.

REASONS FOR GRANTING THE WRIT

I

THERE IS A DIRECT CONFLICT AMONG THE CIRCUITS ON THE APPROPRIATE MATTERS TO BE CONSIDERED UPON REVIEW OF A RULE 56 SUMMARY JUDGMENT MOTION AND THE SUPREME COURT SHOULD THEREFORE HEAR THIS CASE TO BRING NEEDED UNIFORMITY AND FINALITY TO THIS INCREASINGLY IMPORTANT FEDERAL RULE.

A. Due to the vital importance and recurring nature of summary judgments in the federal system, this Court should clear up this conflict among the circuits.

Summary judgment has long been recognized as a vital tool in the federal courts for promptly disposing of meritless actions in order to preserve limited judicial resources. Fed. R. Civ. P. 56 advisory committee's note. This Court recently commented on the importance of this procedure:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). With the ever increasing burden on the federal judiciary, summary judgment is becoming even more necessary to allow the courts to properly handle their overwhelming case loads. *Ford Motor Credit Co. v. Devalk Lincoln-Mercury*, 600 F.Supp. 1547, 1549 (N.D. Ill. 1985); *Kirk v. Home Indem. Co.,* 431 F.2d 554, 560 (7th Cir. 1970). As a result there is a growing need for uniformity among the circuits on the method of handling summary judgment on appeal.

Despite this growing need, the federal circuit courts are in vast disarray on this subject. The area of most confusion and conflict involves the question presented by the instant case, whether an appellate court may properly consider matters not part of the

record below and disclosed for the first time after the motion has been granted.

In the present case, the Fifth Circuit considered and based its reversal on matters submitted after the grant of summary judgment. The reason for reversal was the finding of an alleged "factual issue" as to the plaintiffs' knowledge of the seat defects at the time of filing of the state suit. This "factual issue" was surmised from the affidavits submitted by the plaintiffs' attorneys. Those affidavits were never brought to the attention of the district court prior to the consideration of the summary judgment. The procedure followed by the Fifth Circuit in this case is in direct conflict with the procedure followed by several other courts.

Because of this conflict, federal district judges are without appropriate guidance as to the proper procedure on summary judgment. United States District Judge William Schwarzer recently conducted a comprehensive study on summary judgment in the federal courts. He concluded:

> Trial judges are . . . uncertain about how a summary judgment will fare on appeal and whether hitherto undisclosed issues of fact will be permitted to surface there.

Schwarzer, Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 466 (1984).

Due to this uncertainty, this Court should now hear the present case to bring needed uniformity to this vital procedural tool. Unless federal trial judges are provided with some benchmark, they will be reluctant to grant summary judgment in fear of being reversed as a result of new issues brought to light in the appellate courts. Such a development will serve a serious hardship on the already overburdened federal judiciary and will reverse a trend initiated by this Court in *Celotex* and its progeny to make better use of summary judgment for the purpose of serving judicial economy. Moreover, the existing uncertainty dampens the important federal policy of finality by effectively announcing to litigants opposing summary judgment motions they may always have a "second bite at the apple" and assert new factual positions on appeal even if they have failed to raise them at the trial level.

B. The First Circuit, Third Circuit, District of Columbia Circuit and Seventh Circuit follow the prevailing view that a reviewing court may never consider matters not properly presented to the district court.

A predominant number of circuits hold a view contrary to that taken by the Fifth Circuit in this case. These circuits follow the rule that on reviewing summary judgment motions, the reviewing court may never consider matters that were not properly presented to the trial court. The First Circuit recently stated this view in a case in which a plaintiff sought review of a grant of summary judgment as to certain claims. *Voutour v. Vitale,* 761 F.2d 812 (1st Cir. 1985), *cert. denied,* 474 U.S. 1100 (1986). The parties proceeded to trial on the remaining claims and the jury eventually reached a verdict. The First Circuit held:

> Our review is confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant.

Id. at 817.

The Third Circuit takes a similar approach. In a case much like the present one where a plaintiff attached affidavits to its petition for rehearing, the court of appeals refused to consider this new evidence. Outlining the rule, it said:

> Because of the untimeliness of its filing, and the fact that permission for such filing was neither sought nor granted, the affidavit may not be considered. *The presence or absence of genuine issues of material fact is to be gauged as of the time judgment was entered by the district court.*

Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F.2d 96, 101 (3rd Cir. 1976), *cert. denied,* 429 U.S. 860 (1976) (emphasis added); *see also Drexel v. Union Prescription Centers, Inc.,* 582 F.2d 781, 784 n. 4 (3rd Cir. 1978) ("It is hornbook law that this court generally cannot consider evidence which was not before the court below.").

The District of Columbia Circuit also holds a view opposite the one held by the Fifth Circuit in this case. It recently commented

on the adverse effects to the judicial system and the integrity of the federal courts of allowing new factual issues to be presented after a grant of summary judgment.

> As we have stated on numerous occasions, a party may not seek to overturn the grant of summary judgment by alleging unresolved factual disputes not previously presented to the trial court . . . . [T]o permit him to do so for the first time on appeal would "undermine the integrity of the adversarial process and the authority of the district court to fairly and effectively control the litigation before it."

NRM Corp. v. Hercules, Inc., 758 F.2d 676, 680 (D.C. Cir. 1985) (quoting *Tarpley v. Greene*, 684 F.2d 1, 7 (D.C. Cir. 1982)); *see also Id.* at 7 ("[W]e agree that having never brought the answers to the attention of the district court in opposing [a motion] for summary judgment, appellant cannot rely on them on appeal to obtain a reversal."); *Gilson v. Republic of Ireland*, 787 F.2d 655 (D.C. Cir. 1986) (materials not presented to the district court for consideration of a motion for summary judgment are never properly before the reviewing court).

Finally, the Seventh Circuit follows the prevailing view outlined above. Several cases in that circuit note that

> [I]t is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and it loses the motion, it cannot raise such reasons on appeal.

Liberales v. County of Cook, 709 F.2d 1122, 1126 (7th Cir. 1983); *see also Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1136 (7th Cir. 1987), *cert. denied*, No. 87-600 (1987 Term); *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 360 (7th Cir. 1987); *Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628 (7th Cir. 1986), *cert. denied*, No. 86-1516 (1986 Term); *Dale v. Chicago Tribune*, 797 F.2d 458, 466 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1986); *National Wrecking Co. v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101, 104 (7th Cir. 1986).

C. The Sixth Circuit, Ninth Circuit, Eleventh Circuit and Fifth Circuit all either allow reviewing courts to consider new matters on appeal or are in conflict as to the proper method.

Despite the prevailing view that appellate courts may never hear matters not brought up below, a number of circuits follow the Fifth Circuit in this case and consider new issues on appeal of summary judgment motions whenever they feel it is necessary to do so. This ad hoc approach not only conflicts with the standard followed by the First, Third, District of Columbia and Seventh Circuits, but also demeans the role of the federal district court judges and undermines the utility of Rule 56. Schwarzer, *supra* at 493. As a result, this Court should grant *certiorari* to resolve this conflict.

The Sixth Circuit recently outlined its view of considering matters not made part of the trial court record. In reviewing a deposition that was never brought to the attention of the trial court, the Sixth Circuit stated:

> [I]f the appellate court becomes convinced that the appellant, although acting in good faith, has somehow or other failed to raise at the trial court level a genuine factual issue that is, nevertheless, present in the case it should make such a disposition of the appeal that will permit him to do so.

Ghandi v. Police Dept. of the City of Detroit, 747 F.2d 338, 348 (6th Cir. 1984); *see also Chapman and Dewey Lumber Co. v. United States,* 359 F.2d 495 (6th Cir. 1966). The court apparently believed review of summary judgment matters turns on the relative "importance" of the issues involved.

> The need to avoid rigid application of procedural rules is especially apparent in cases, such as the instant one, where important first amendment rights are at stake. Thus . . . we exercise our discretion to examine the whole record, not just the evidence specifically called to the attention of the district court.

Ghandi, 747 F.2d at 348.

Such an approach reduces the level of finality in our federal system. By following this amorphous standard, the Sixth Circuit is encouraging litigants to be lax at the trial court level, for they may always make up for their lack of diligence and argue new factual issues on appeal. This Court should not allow the finality of Rule 56 motions to be further impaired.

The Ninth Circuit shares the approach taken by the Sixth Circuit. Without giving any reasons, it considered matters on a summary judgment motion which were not before the district court.

> As this case was presented in the district court it was not apparent that any such issue of fact was involved. As the case unfolded in this court, however, genuine issues of material fact . . . have been revealed. Under these circumstances we think that the proper course is to send the case back for a full trial.

Smith v. United States, 362 F.2d 366, 368 (9th Cir. 1966).

The Eleventh Circuit also chooses to deal with this issue on an ad hoc basis. Commenting recently on its equitable power to consider matters that were not considered below, the court noted that it "has not articulated a general rule for when it is appropriate. Rather, we have dealt with such requests on a case-by-case basis." *Ross v. Kemp,* 785 F.2d 1467, 1474 (11th Cir. 1986).

Finally, the Fifth Circuit best exemplifies the prevailing confusion and uncertainty on appeal of summary judgment motions. There is a conflict within that very circuit over this issue. "Some Fifth Circuit cases suggest that [an appellate] court passing on a motion for summary judgment must make an independent review of the record looking for disputed issues of material fact." *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co., Inc.,* 695 F.2d 839, 845 (5th Cir. 1983); *see also John v. State of Louisiana,* 757 F.2d 698, 712 (5th Cir. 1985); *Higgenbotham v. Ochsner Foundation Hospital,* 607 F.2d 653, 656-57 (5th Cir. 1979); *Keiser v. Coliseum Properties, Inc.,* 614 F.2d 406, 410 (5th Cir. 1980); *McDaniel v. Travelers Ins. Co.,* 494 F.2d 1189, 1190 (5th Cir. 1974). "Other Fifth Circuit cases suggest that '[a]bsent extraordinary circumstances, we should not reverse a grant of

summary judgment based on the presence of a factual issue that was not in some way brought to the attention of the district court.' " *Nicholas,* 695 F.2d at 846 (quoting *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.,* 669 F.2d 1026, 1033 n. 7 (5th Cir. 1982)); *see also Local Union No. 59 Int'l Bhd. of Elec. Workers, AFL-CIO v. Namco Elec.,* 653 F.2d 143 (5th Cir. 1981); *Munoz v. International Alliance of Theat'l Stage Employees and Moving Picture Mach. Oper. of the U.S. and Canada,* 563 F.2d 205 (5th Cir. 1977); *Garcia v. American Marine Corp.,* 432 F.2d 6, 8 (5th Cir. 1970). Like the Eleventh Circuit, however, the Fifth Circuit has chosen not to try to reconcile this conflict. *Nicholas,* 695 F.2d at 846 ("[W]e attempt neither to choose between the two Fifth Circuit principles nor to reconcile them."); *John,* 757 F.2d at 712 ("[A]gain, we need not attempt to reconcile the apparent conflict or make a choice between conflicting rules. . . . ").

The conflict among the circuits on this issue is clear. The importance of this federal procedural device coupled with its recurring nature in the federal courts warrant this Court's granting this writ of certiorari to settle the issue. Rule 56 summary judgment motions are the cornerstone of our federal judicial system. They are becoming more and more vital to the judicial process given the overwhelming caseloads burdening the federal courts. Unless there is some uniformity brought to the question of what a reviewing court may properly consider on review of a summary judgment, the utility of this device will be substantially impaired. Further, the role of district judges will continue to be denigrated by allowing appellate courts to consider new matters on appeal. Finally, lawyers will be rewarded for less than diligent work and the concept of finality will be turned on its head. This petition should therefore be granted so that this Court may resolve this matter.

II

THE FIFTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN *CELOTEX* AND *ANDERSON* BY APPLYING THE INCORRECT STANDARD FOR SUMMARY JUDGMENT.

A. The Fifth Circuit opinion contravenes this court's opinion in *Celotex* by allowing respondent to oppose the summary judgment motion by resort only to the pleadings.

This Court recently outlined the proper standard for summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the district court granted summary judgment in favor of defendant Celotex Corp. *Id.* at 320. The District of Columbia Circuit Court of Appeals reversed, holding that Celotex's motion was "fatally defective" because it did not adduce any evidence, in the form of affidavits or otherwise, to support its motion. *Id.* at 321.

This Court reversed, holding that a moving party need not support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* at 323. Rather, after the moving party meets its initial responsibility of informing the district court of the basis for its motion, the burden is then on the non-moving party to go beyond the pleadings and show there is a genuine issue for trial. *Id.* at 324. The Court outlined this burden:

> Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id. at 324. This Court emphasized that the last two sentences of Rule 56(e) were added to "disapprove a line of cases allowing a party opposing a summary judgment to resist a properly made motion by reference only to its pleadings." *Id.* at 325.

The Fifth Circuit in the present case ignored this standard. Petitioner Cessna met its initial responsibility of informing the district court of the basis of its motion. Respondents, however, did

not meet their burden of going beyond the pleadings and designating specific facts showing genuine issues for trial. Respondents did not introduce any affidavits or factual material in opposition to the motion. Respondents merely presented a "response to itemization of facts relied upon by Cessna" and a brief, both of which referred only to the pleadings. (S. R. 1, 30-35; S. R. 2, 31-37; S. R. 3, 32-37) As a result, the district court properly found that there was no genuine issue of material fact.

The Fifth Circuit reversed the district court basing its opinion on affidavits that were submitted *after* the entry of summary judgment which were never part of the record below. By reversing the district court, the Fifth Circuit did exactly what this Court prohibited in *Celotex*. Like the District of Columbia Circuit Court in *Celotex*, the Fifth Circuit reversed a summary judgment where the non-moving party had not met its burden of presenting affidavits or other material to designate specific facts showing a genuine issue of material fact. As such, its actions are in direct conflict with *Celotex*.

Moreover, allowing the Fifth Circuit decision in this case to stand would defeat the whole policy underlying the *Celotex* decision. This Court sought to make clear that summary judgment is a useful device that serves important interests of parties opposing claims.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, *but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the rule, prior to trial, that the claims and defenses have no factual bases.*

Id. at 327 (emphasis added). The Fifth Circuit opinion contravenes that policy by subscribing to the now improper notion that a summary judgment motion may be defeated by mere resort to the pleadings. This Court should grant this petition for certiorari to protect the integrity of *Celotex* and to insure that a properly supported motion for summary judgment may not be defeated by mere reference to unsupported allegations in the pleadings.

B. The Fifth Circuit opinion contravenes this Court's opinion in *Anderson* by basing its reversal on non-material factual issues.

In the companion case to *Celotex*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court addressed the issue of "material facts" in regard to summary judgment motions. The Court gave further endorsement to the summary judgment procedure by commenting that "the mere existence of *some* alleged factual dispute between the parties" is not enough to defeat a properly supported summary judgment motion. *Id.* at 247-48. Rather, there must be a *genuine* issue of *material* fact. As to materiality, the Court stated:

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . [I]t is the *substantive laws* identification of which facts are critical and which facts are irrelevant that governs.

Id. at 248 (emphasis added).

In the present case the only "new fact" upon which the court of appeals based its decision to reverse the grant of summary judgment was that respondents might not have known of the alleged seat defect at the time of *filing* its suit and therefore the substantive requirements of judicial estoppel and election of remedies were not all met. *Butcher v. Cessna Aircraft Co.*, 850 F.2d 247, 255 (5th Cir. 1988). However, the substantive law of Mississippi holds that it is the time of *electing a remedy* or *reaching a settlement* that is significant and not the time of *filing*. *Coral Drilling, Inc. v. Bishop*, 260 So.2d 463, 466 (Miss. 1972), *cert. denied*, 409 U.S. 1007 (1972) (employee who prosecuted suit based on contention that blue truck caused his injuries, *to extent of reaching settlement* with owner of blue truck was thereafter precluded from suing owner of red truck for same injuries based on contention that red truck caused his injuries); *O'Briant v. Hull*, 208 So.2d 784, 787 (Miss. 1968) (where mother chose to pursue former remedy to *compromise and settlement*, she was bound by that election and could not thereafter proceed against guardians).

At the time of the settlement or the election of remedy in this case, respondents knew of the alleged defect and therefore were barred from bringing an inconsistent claim. Petitioner met its burden with respect to this issue by showing in its moving papers that respondents, in their settlement agreement, expressly reserved their right to sue Cessna. (R. B-170-71) Thus, the "fact" relied on by the Fifth Circuit (lack of knowledge at the time of *filing*) was not a material fact under the *Anderson* standard because it would not affect the outcome under the Mississippi substantive law (knowledge only significant as of time of settlement). The Court should therefore hear the present case to rectify this diversion from *Anderson.*

III

THE FIFTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO WARRANT AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Justice Stevens recently said: "As the court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez,* 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). There is no better example of a need for error-correcting than in the present case. The Fifth Circuit committed several egregious legal and factual errors to warrant this Court exercising its discretionary power to correct the situation.

First, as stated above, the Fifth Circuit acted in contravention of this Court's decisions in *Celotex* and *Anderson* by applying the wrong legal standard for summary judgment motions. The Fifth Circuit did not hold respondents to their proper burden and based its reversal on a "fact" that was not properly before the court. Such a departure frustrates the Supreme Court's purpose in establishing uniform rules for summary judgment procedure. This Court should thus hear the present case to resolve this departure.

Second, the Fifth Circuit Court of Appeals based its reversal of the summary judgment on affidavits given by the respondents'

attorneys. Butcher, 850 F.2d at 250. Federal precedent has made clear that it is improper and unsound to rely on affidavits by attorneys. The Fifth Circuit recently commented that "Experience proves that the adversary system functions best when role of judge, of counsel, and witness is sharply separated." *Inglett & Co. v. Everglades Fertilizer Co.*, 255 F.2d 342, 350 (5th Cir. 1958); *see also L.E. Equia v. Tompkins*, 756 F.2d 1130, 1136 (5th Cir. 1985) (court could not "condone the use of such an improper affidavit"). The Court concluded that it is an inherently unsound practice to have affidavits in support of a motion for summary judgment prepared and sworn to by counsel. *Id.* at 349. Since the Fifth Circuit improperly relied on post-summary judgment affidavits given by plaintiffs' attorneys, certiorari should be granted in the present case to rectify this departure from normal procedure.

Third, the Fifth Circuit made a flagrant and crucial factual mistake in its opinion. The court held that there was a genuine issue on whether the widows knew of the possible seat defects when they sued in state court for pilot negligence. The court based that belief on the following:

> [T]he *widows' affidavits* sufficed to show a genuine issue on whether the widows did know of possible seat defects when they sued in state court for pilot negligence. As long as there is a genuine dispute concerning the extent of the *widows' knowledge*, one of the elements of judicial estoppel or election of remedies is missing.

Butcher, 850 F.2d at 250 (emphasis added). However, contrary to the court's belief, the *widows* never submitted affidavits as to their knowledge of the seat defects. Rather, it was only the *attorneys* of the widows who submitted those affidavits. That error is significant because, as stated earlier, attorneys' affidavits are not proper grounds on which to base summary judgment. By believing that the widows themselves submitted affidavits, the Fifth Circuit apparently did not realize it was basing its reversal on such an unsound ground. Given this error, this Court should step in and rectify the matter.

Finally, as noted earlier, the Fifth Circuit misapplied the substantive Mississippi law of election of remedies. The court

concluded that it is the time of *filing* and not the time of *electing a remedy* that is significant for the doctrine. *Id.* However, both *Coral Drilling* and *O'Briant, supra*, make clear that it is the time of settlement or electing the remedy that is significant for the purpose of knowledge of the second claim. In this case, respondents clearly knew of the defect at the time of settlement and thus their subsequent action should have been barred. *Coral Drilling, Inc.*, 260 So.2d at 466; *O'Briant*, 208 So.2d at 787. Due to this misapplication of Mississippi law, this Court should hear the instant case.

Given such broad and extensive departures from proper procedures, this Court is warranted in exercising its discretion to hear this case for the purpose of performing an error-correcting function in its role as supervisor of federal litigation.

CONCLUSION

The Fifth Circuit considered matters introduced after the granting of a summary judgment motion. This procedure, followed by some circuits, directly conflicts with the procedure followed by several other circuits. Given such wide disparity and confusion on the review of this important procedural device, this Court should grant the present writ to definitively settle the issue. Further, certiorari is warranted due to the Fifth Circuit's contravention of the holding by this Court in *Celotex* and *Anderson*. Finally, this Court should hear the instant case to correct the radical departure by the Fifth Circuit from existing federal procedure.

Respectfully Submitted,

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January 9, 1989

(Appendices follow)

APPENDIX A

MERILYN W. BUTCHER,
Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,
Defendant-Appellee.

Martha J. NOBLE, Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,
Defendant-Appellee.

Carolyn S. DURBIN,
Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,
Defendant-Appellee.

No. 87-4823.

United States Court of Appeals,
Fifth Circuit.

July 27, 1988.

Rehearing Denied Aug. 29, 1988.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE,[1] District Judge.

JOHNSON, Circuit Judge.

The widows of the victims of a small plane crash appeal from two district courts' summary judgment dismissal of their products liability suit against Cessna Aircraft Co., the manufacturer of the airplane. The district courts in this consolidated suit held that the widows were precluded from suing Cessna because they made inconsistent statements in an earlier state suit and were thus barred by the doctrines of election of remedies and judicial estoppel. Because we hold that there was a genuine issue of fact on a key element of election of remedies or judicial estoppel under Mississippi law, we reverse and remand.

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[1]District Judge of the Eastern District of Louisiana, sitting by designation.

I. BACKGROUND

The facts and procedural history of the instant case are ably set out in the district court opinion, and we will only summarize them here. On June 19, 1982, a 1979 Cessna airplane crashed at the Gulf Park Airport in Ocean Springs, Mississippi. Lee Roy Butcher was seated in the left front seat; Ronald Wayne Durbin was seated in the right front seat; and Evarist Noble was seated in the rear seat. A dispute still exists as to whether Butcher or Durbin was piloting the plane when it crashed. All three men were killed. The airplane was owned by Janet Green and leased to Gulf Park Aviation, Inc., the stock of which was owned by Durbin and Noble.

The only known witness to the crash was an experienced pilot, Robin Reinke. Reinke testified that he saw the airplane start down the runway, retract its landing gear when just

off the ground, lower its nose slightly and fly level in attempt to gain speed, pull up steeply, and roll to the left. Reinke said that at the end of the runway the plane suddenly took a nosedive and crashed into trees. Reinke observed no engine problems. Instead, Reinke gave his opinion that the pilot was attempting a stunt takeoff.

The three widows brought suits in Mississippi state court. Martha J. Noble sued Gulf Park Aviation and Butcher and Durbin's estates, alleging negligent piloting by either Butcher or Durbin and negligent maintenance and control by Gulf Park. Merilyn W. Butcher sued Gulf Park, Janet Green, and Durbin's estate. Butcher sued Durbin for negligent piloting and Green and Gulf Park under vicarious liability theories. Carolyn Sue Durbin sued Butcher's estate, Gulf Park Aviation, and Janet Green, alleging negligent

piloting by Butcher, as well as failure to maintain or warn "of the dangerous condition and propensity of the airplane" on the part of Green and Gulf Park. Ideal Mutual Insurance Company, Gulf Park's insurer, sued in federal district court for a declaratory judgment on coverage. In October 1984, Noble, Butcher, and Durbin reached a settlement agreement with Gulf Park and Ideal Mutual. The agreement provided that the plaintiff-widows would receive $225,000, to be divided equally. The agreement expressly reserved the widows' right to pursue a suit against Cessna, and provided that the widows would reimburse Ideal Mutual out of a recovery from Cessna. The state court suits and the federal declaratory judgment suit were dismissed.

In April and May 1985, Butcher, Noble and Durbin brought the instant suit in two federal district courts against Cessna for negligent

design and strict liability. The widows claimed that the left front seat of the aircraft, occupied by Butcher, was negligently designed so that it would slip back without warning. The complaint asserted that Butcher was piloting the plane and that, during takeoff, his seat suddenly slipped back, causing him to pull on a lever and lose control. In September 1987, the two district courts granted joint summary judgment for Cessna against all three plaintiffs, holding that Butcher, Noble, and Durbin's complaints and other statements in the state suits were factually inconsistent with their claims in the federal suits, and thus barred by the Mississippi doctrines of election of remedies or judicial estoppel, 668 F.Supp. 569. Butcher, Noble, and Durbin submitted affidavits from their attorneys and a copy of the state-court settlement in an effort to

show that they were unaware of the possibility of a seat defect when they filed their state complaints and that the settlement reserved a right to sue Cessna. The district courts denied reconsideration.

II. DISCUSSION

Election of remedies and judicial estoppel are closely related doctrines under Mississippi law. The Mississippi courts usually discuss the two doctrines together. Because any distinctions between the two have no apparent relevance to the instant suit, our discussion will draw on precedents citing either doctrine.

The key Mississippi Supreme Court case on election of remedies is Coral Drilling, Inc. v. Bishop, 260 So.2d 463 (Miss.), cert. denied, 409 U.S. 1007, 93 S.Ct. 438, 34 L.Ed.2d 300 (1972). In that case, a telephone repairman was injured by falling off

a pole that was hit by a truck. The repairman, Bishop, brought suit charging that the pole had been hit by a red truck owned by Smith, Inc. He settled this first suit for $90,000. Bishop then brought a second suit against Coral Drilling, Inc., alleging that he had been hit by a blue Coral Drilling truck, and received a judgment on that suit. The Mississippi Supreme Court reversed the second judgment, holding that since Bishop admitted that the pole had been struck by only one truck, there was a basic inconsistency between his two suits and he could not recover on both. The court explained that election of remedies bars the second suit when "one action alleges what the other action denies, and the facts necessary to support one remedy are inconsistent with those necessary to support the other." Id. at 465. The Mississippi Supreme Court went on to state, "The two

remedies Bishop sought to pursue are totally inconsistent; either a Smith truck struck the wire, or a Coral truck struck it." Id. The fact that the first suit was terminated by a settlement made it no less binding. Id. The court also stated that Bishop might be judicially estopped to pursue his second claim. Id. at 466.

Other Mississippi cases on election of remedies/judicial estoppel include O'Briant v. Hull, 208 So.2d 784 (Miss. 1968) in which the court held that a plaintiff cannot claim, in one suit, that she was the beneficiary on a life insurance policy, and then bring a second suit alleging that the policy should have been changed to name her as beneficiary. By contrast, in Banes v. Thompson, 352 So.2d 812 (Miss. 1977), the court declined to apply election of remedies or judicial estoppel to bar the victim of a two-car accident from

suing first one driver and then the other. The court observed that the plaintiff had discovered new facts between the two suits, and that it was possible for both drivers to be at fault. 352 So.2d at 815.

In O'Briant, the Mississippi Supreme Court listed the elements of election of remedies as: "(1) the existence of two or more remedies, (2) the inconsistency between such remedies, and (3) a choice of one of them." 208 So.2d at 786. The court quoted with approval an earlier case holding that the "choice" element requires that the party barred be "'cognizant of his legal rights and of such facts as will enable him to make an intelligent choice.'" Id. (quoting Anaconda Aluminum Co. v. Sharp, 136 So.2d 585, 588 (Miss. 1962), which in turn quotes 18 Am.Jr., Election of Remedies, at 129). In Thomas v.

Bailey, the Mississippi Supreme Court emphasized the knowledge requirement:

> In the cases in which this Court has invoked the doctrine of judicial estoppel, the party against whom the estoppel was sought, knowingly, with full knowledge of the facts, asserted a position which was inconsistent with a position in prior judicial proceedings. . . .
>
> Judicial estoppel should not be invoked where the position first assumed was taken as a result of mistake. . . . [T]here can be no estoppel where the admissions or statements were made through mistake or without full knowledge.

375 So.2d 1049, 1053 (Miss. 1979) (emphasis added). See also Daughtrey v. Daughtrey, 474 S.2d 598, 602 (Miss. 1985); State v. Gardner, 236 Miss. 768, 112 So.2d 362, 365 (1959).

In the instant case, Cessna points to obvious inconsistencies between Butcher, Durbin, and Noble's pleadings in the state suits and their pleadings in the federal suits. In the state suits, the widows

asserted that the pilot negligently carried out a stunt takeoff; in Noble and Butcher's federal complaint, they claim that the pilot "was piloting the airplane in question in a lawful and proper manner." Record Vol. 7 at 3. In the state suits, the widows disagreed on whether Butcher or Durbin was at the controls; in the federal suit, they assert that Butcher was. The widows counter that the identity of the pilot is immaterial, so long as they can prove that the pilot's seat did slip backward because of a defect and cause the crash. In addition, the widows point out that it is possible that the pilot could have been attempting an imprudent stunt that turned into a fatal crash only when his seat suddenly slipped back.

However, we need not finally determine whether the state and federal complaints are contradictory, for the plaintiff-widows have

presented evidence creating a genuine issue as to the knowledge requirement of judicial estoppel/election of remedies. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Butcher, Noble and Durbin claim that when they filed the state suit they did not know of the possibility that Cessna pilot seats were defective and of evidence indicating that a defect in the seat of this aircraft could have caused the accident. The widows' attorneys submitted affidavits in support of this contention. Cessna counters that extensive discovery took place in the state suit, and that some of the same experts now used in the instant products liability suit were already involved in the state suit. However, the widows' affidavits suffice to show a genuine issue on whether the widows did know of possible seat defects when they sued in state

court for pilot negligence. As long as there is a genuine dispute concerning the extent of the widows' knowledge, one of the elements of judicial estoppel or election of remedies is missing.

III. CONCLUSION

The district courts granted summary judgment to Cessna aircraft based solely on the Mississippi doctrines of judicial estoppel or election of remedies. However, under these doctrines, the party barred must have known the material facts at the time he made his prior statement or election. The plaintiff-widows have presented evidence to show that they were not aware of the possibility of defective seats when they filed their state court law suits. This genuine issue of material fact precluded summary judgment. The district courts' judgment is, accordingly

REVERSED AND REMANDED.

APPENDIX B

Merilyn W. BUTCHER, Plaintiff,

v.

CESSNA AIRCRAFT COMPANY, Defendant.

Martha J. NOBLE, Plaintiff,

v.

CESSNA AIRCRAFT COMPANY, Defendant.

Carolyn S. DURBIN, Plaintiff,

v.

CESSNA AIRCRAFT COMPANY, Defendant.

Civ. A. Nos. S85-0456(R), S85-0510(R) and S86-0602(G).

United States District Court, S.D. Mississippi, S.D.

Sept. 9, 1987.

JOINT MEMORANDUM OPINION

DAN M. RUSSELL, JR., District Judge (Nos. S85-0456(R) and S85-0510(R)).

WALTER J. GEX, III, District Judge (No. S86-0602(G)).

This matter is presently before these Courts on separate motions for summary judgment filed by the defendant, Cessna Aircraft Company, against the plaintiffs, Merilyn Butcher,Martha Noble and Carolyn Durbin. The defendant alleges that as a result of the allegations made in prior state court lawsuits and a subsequent settlement based on those allegations, the plaintiffs have selected their remedy and are therefore estopped from pursuing the present actions against it. For the reasons more fully set forth herein, we are of the opinion that the motions for summary judgment should be granted.

FACTS

On June 19, 1982, a 1979 Model Cessna R182 airplane crashed at the end of the runway at Gulf Park Airport in Ocean Springs, Mississippi. There were three people

occupying the airplane, Lee Roy Butcher, who was positioned in the left front seat, Ronald Wayne Durbin, who was positioned in the right front seat, and Evarist Noble, who was positioned in the rear bench seat. All of the passengers were killed. The airplane was owned by Janet Green and operated on a lease back to Gulf Park Aviation, Inc. The stock of Gulf Park Aviation, Inc. was owned jointly by Durbin and Noble.

The only known eyewitness to the accident was Robin R. Reinke. Mr. Reinke gave a statement to the National Transportation Safety Board and later testified in a deposition that he saw the airplane begin its roll down the runway, retract its gear while barely airborne, lower its nose a bit to fly at a level altitude down the runway to gain airspeed, and pull up into a steep climb combined with a roll to the left when the

plane reached the end of the runway. He stated that he saw the airplane crash into trees at a 50° nose-low altitude in a 45° to 50° bank while the airplane was attempting to pull out of the roll. Mr. Reinke further testified that the engine was developing full take-off power at the time of the take-off, and that the engine was running smooth as silk.

HISTORY OF THE CASE

A. Prior Litigation

Presently before United States District Judge Dan M. Russell, Jr. are two separate motions for summary judgment in two separate suits, Civil Action Nos. S85-0456(R) and S85-0510(R). The actions consist of virtually identical legal and factual disputes. A third suit, Civil Action No. S86-0602(G), currently before United States District Judge Walter J. Gex, III, is also factually and legally

similar to the above referenced actions and also has pending a motion for summary judgment. For the purpose of judicial clarity and succinctness, this Opinion has been jointly authored by Judge Gex and Judge Russell and will analyze and decide the propriety of the summary judgment motions with respect to all three of the above referenced cases.

Martha J. Noble, the widow and Executrix of the Estate of Evarist L. Noble, was the first to file suit. On November 18, 1982, she commenced an action in the Circuit Court of Jackson County, Mississippi against Gulf Park Aviation, Inc., Merilyn W. Butcher, as Executrix of the Estate of Lee R. Butcher, deceased, and Carolyn Sue Durbin, as Executrix of the Estate of Ronald Wayne Durbin, deceased. In this action, filed on November 18, 1982, and assigned Cause Number

12,124, Mrs. Noble alleged that her husband died while riding as a passenger in an airplane that was negligently flown by either Lee Roy Butcher or Ronald Wayne Durbin. In addition, she alleged that Gulf Park Aviation, Inc. failed to exercise proper care and caused, allowed, and permitted the airplane to suddenly and violently crash to the ground. She also alleged that Gulf Park Aviation, Inc. "negligently and carelessly managed, maintained, operated, and controlled its aircraft and equipment."

Merilyn W. Butcher filed suit on September 22, 1983, in the Circuit Court of Jackson County, Mississippi against Gulf Park Aviation, Inc., Carolyn Sue Durbin, as Executrix of the Estate of Ronald Wayne Durbin, deceased, and Janet Green. This case was assigned Cause Number 83-5334. Mrs. Butcher alleged that Ronald Wayne Durbin was

the actual pilot of the airplane and caused the crash because of careless and reckless operation and negligence. The causes of action stated against Gulf Park Aviation, Inc. and Janet Green were for their vicarious liability as the operator and owner, respectively, of the airplane. In addition, Gulf Park Aviation, Inc. was alleged to have been the employer of Ronald Durbin and, for that reason, liable under the doctrine of respondeat superior.

Carolyn Sue Durbin, the widow and Executrix of the Estate of Ronald Wayne Durbin, was the last to file suit. She filed a complaint in the Circuit Court of Jackson County, Mississippi on February 8, 1984 against Merilyn W. Butcher, as Executrix of the Estate of Lee Roy Butcher, deceased, Gulf Park Aviation, Inc. and Janet Green. In her complaint she alleged that Lee Roy Butcher was

actually piloting the airplane and that he negligently executed a roll to the left upon take-off, causing the crash. Gulf Park Aviation, Inc. and Janet Green were charged with failing to warn the pilot "of the dangerous condition and propensity of the airplane."

As the three suits progressed on the docket of the Circuit Court of Jackson County, Mississippi, a motion for consolidation was filed by Merilyn W. Butcher requesting that her lawsuit be consolidated with the suit brought by Martha J. Noble. In support of the motion, an affidavit was filed on January 20, 1984, which recited in part that "both of the above causes [Cause Number 83-5334 and Cause Number 12-124] arise out of the same aircraft accident which occurred on or about June 19, 1982, at the airport in Ocean Springs, Jackson County, Mississippi, in which the decedents of

both plaintiffs were killed. Further, both actions allege, at least in part, that Ronald Wayne Durbin, deceased, was the pilot in command and the pilot at the controls of the involved aircraft, that he was negligent, and that his negligence caused the deaths of the decedents of both plaintiffs."

All three cases were ultimately consolidated for all purposes by an order entered by the Circuit Court of Jackson County, Mississippi on March 5, 1984.

On March 14, 1983, Ideal Mutual Insurance Company, the insurance carrier for Gulf Park Aviation, Inc., filed a complaint for a Declaratory Judgment on the issue of coverage against Gulf Park Aviation, Inc., Martha J. Noble, Individually and as Executrix of the Estate of Evarist L. Noble, deceased, Carolyn Sue Durbin, Individually and as Executrix of the Estate of Ronald Wayne Durbin, deceased,

Merilyn W. Butcher, Individually and as Executrix of the Estate of Lee Roy Butcher, deceased, Janet F. Green and Ocean Springs State Bank, a division of Pascagoula-Moss Point Bank. This action was assigned Civil Action Number S83-0252(N) in the United States District Court for the Southern District of Mississippi, Southern Division. Thereafter, the plaintiffs settled their respective wrongful death claims against the defendant Gulf Park Aviation, Inc. The total settlement was for $225,000.00 which was divided equally among the plaintiffs. A consolidation order of dismissal without prejudice was entered upon announcement and by agreement of the parties in all three cases on October 23, 1984. Civil Action No. S83-0252(N) was dismissed without prejudice on April 8, 1985.

B. Present Litigation

On April 10, 1985, Merilyn Butcher commenced her present action against Cessna Aircraft Company (Cessna). Thereafter, on April 22, 1985, Martha Noble filed suit against Cessna. Carolyn Durbin followed, and on May 5, 1985, she filed suit against Cessna.

Each of the complaints allege that Butcher was the pilot actually manipulating the controls at the time of the crash and that the crash occurred because the seat he was occupying slipped back on its tracks, rendering him unable to reach the controls and maintain full control of the airplane.

Pursuant to Cessna's motions, the issue presented to this Court is whether the plaintiffs, who have alleged in prior litigation that their decedents were killed in an airplane accident caused by reasons other than a manufacturing and design defect in the airplane and who made a recovery by way of

settlement as a result of the allegations made in the earlier lawsuit, may now change their direction and claim what they earlier alleged to be true no longer true and that the design and/or manufacturing defects in the airplane manufactured by Cessna caused the accident and resulting deaths.

The plaintiffs respond by arguing that there is no denial of the earlier allegations in that there is nothing inconsistent with the position that Cessna negligently designed and manufactured the seat and/or is strictly liable for the defective design of the seat which either proximately caused or contributed to the crash.

ELECTION OF REMEDIES AND/OR
JUDICIAL ESTOPPEL

Cessna bases its motions for summary judgment upon the doctrines of judicial estoppel and election of remedies and in support thereof relies heavily on Coral

Drilling, Inc. v. Bishop, 260 So.2d 463 (Miss. 1972), cert. denied 409 U.S. 1007, 93 S.Ct. 438, 34 L.Ed.2d 300 (1972), and O'Briant v. Hull, 208 So.2d 784 (Miss. 1968). In O'Briant, the Court determined that when a litigant adopts facts necessary to recover in one suit, he waives the right to assert opposite and repugnant facts necessary to maintain a second suit. In O'Briant, the plaintiff first commenced litigation in federal court on the allegation that she was the designated beneficiary of a life insurance policy purchased by her deceased son. The dispute was resolved by stipulation in which the plaintiff recovered one-half of the face value of the insurance policy. Thereafter, the plaintiff commenced an action in Mississippi Chancery Court which alleged that the guardians of her son, a noncompos mentis, had a legal duty to see that the beneficiary

of the insurance policy was changed to name either the plaintiff or her son's estate upon the son's divorce, and that this entitled her to recover $5,000.00 from the guardians. The chancellor dismissed the suit after finding that:

> It is true that the complainant has proceeded in two distinct causes of action arising out of separate and distinct facts, however, the difficulty here is one action alleges what the other action denies, and the facts necessary to support one remedy is inconsistent with those necessary to support the other.

208 So.2d at 786-87.

The Supreme Court affirmed, stating:

> The complainant had the choice of pursuing the remedy afforded to her as the alleged beneficiary in the policy or to prosecute a suit against the guardians for their failing to have the beneficiary changed to the

> complainant or to the insured's estate. Either cause of action was open to her, but not both causes. Complainant chose to pursue the legal route afforded her as the beneficiary of the policy and this was pursued to compromise and settlement. Complainant is bound by this election and cannot now proceed against the guardians.

208 So.2d at 787.

In Coral Drilling, the plaintiff, Bishop, initially sued Smith and Coral in Circuit Court, alleging that one of Smith's large, red trucks, while furthering the business of Coral, struck a wire that was connected to a pole on which he was working, causing him to all and sustain injuries. Bishop asserted in sworn Answers to Interrogatories that the truck that struck the wire and caused his injury was a large, red truck. Coral was dismissed from the suit. Smith, who operated a fleet of large, red trucks, decided that

Bishop's allegations had enough merit to offer $90,000.00 in settlement. Bishop accepted Smith's offer, received the sum of $90,000.00 from Smith, and caused his case to be dismissed by a judgment which recited that Smith denied liability but had paid $90,000.00 in recognition of the severity and permanent nature of Bishop's injuries.

Thereafter, Bishop commenced an action in Chancery Court against Coral in which he alleged and testified that the truck that caused his injury was blue and had a sign on the side that stated "Coral". All of the trucks that Coral operated were painted blue. coral claimed that Bishop was precluded from prosecuting the suit against it because Bishop had elected his remedies by suing Smith and claiming that a red truck struck the wire. The trial court in this attachment in Chancery action allowed the suit to go to trial. A

judgment for $350,000.00 reduced by the $90,000.00 recovered from Smith, was entered in Bishop's favor. Coral appealed, and the Mississippi Supreme Court reversed and rendered, holding that:

> We hold that because Bishop prosecuted the suit against Smith to the extent of reaching a settlement based on the contention that a Smith truck caused his injuries, he was thereafter precluded from suing Coral for the same damages based on the contention that a Coral truck caused his injuries.

260 So.2d at 466.

The Supreme Court explained that:

> The two remedies Bishop sought to pursue are totally inconsistent; either a Smith truck struck the wire or a Coral truck struck it. 'The compromise and settlement of a suit constitutes such an election as will preclude plaintiff from thereafter prosecuting an

> action based upon a theory inconsistent with that on which the former action was maintained.' (208 So.2d at 787). Courts will not permit litigants solemnly to affirm tat a given state of facts exists from which they are entitled to a particular relief, and then afterwards affirm, or assume, that a contrary state of facts exists from which they are entitled to inconsistent relief.

260 So.2d at 465-66.

It is the position of Cessna that consistent with Coral Drilling and O'Briant, the plaintiffs are necessarily denying what they earlier alleged to be true: that Merilyn Butcher no longer alleges negligence by Durbin and/or Gulf Park Aviation, Inc.; that Martha Noble no longer alleges negligence by either Durbin or Butcher and/or Gulf Park Aviation, Inc.; and that Carolyn Durbin no longer alleges negligence by Butcher and/or Gulf Park Aviation, Inc.

The present litigation argues that Butcher was the pilot manipulating the controls, that he was not negligent and that the sole and proximate cause of the accident was the alleged defectively manufactured and/or designed seat which slipped during take-off.

The plaintiffs counter this argument by asserting that the present actions are based on negligence and/or strict products liability. The plaintiffs assert that there is nothing inconsistent with the position that Cessna negligently designed and manufactured the seat and/or is strictly liable for the defective design of the seat which either proximately caused or contributed to the crash. Presently, it is the contention of the plaintiffs that negligent control and maintenance of the aircraft is immaterial if

the design defect of the seat proximately caused or contributed to the crash.

The plaintiffs contend that in Coral Drilling there was only one instrumentality which caused the accident (either a red truck or a blue truck) and as a result thereof, there was no possibility of any joint-negligence or combined negligence. The plaintiffs allege that joint tort-feasors are jointly and severally liable and may be proceeded against, either singularly or jointly, individually or collectively. Junkins v. Brown, 238 Miss. 142, 117 So.2d 712 (1960). The plaintiffs suggest that a more closely analogous situation to the instant action is Banes v. Thompson, 352 so.2d 812 (Miss. 1977). In Banes, the plaintiff, a passenger in a vehicle being driven by her grandfather, brought suit against Thompson, the operator of a vehicle which collided with

the vehicle in which she was riding. The action was based on negligence. The case was originally tried to verdict against Thompson but the court granted a new trial. Pending the second trial, the plaintiff amended her complaint to sue both her grandfather, Banes, and Thompson for negligence. The court held that the doctrine of election of remedies applied only where a party elects to pursue one of two inconsistent remedies open for assertion of a right arising from the same set of facts. The court stated:

> In the present case, there are no inconsistent remedies available to or claimed by appellant for assertion of her rights. She sought to recover damages for personal injuries based on theories of negligence in both actions, and particularly so after Thompson charged in his first answer that Banes was guilty of negligence which was the sole proximate cause of the collision and testified to facts in support of that charge.

352 So.2d at 815.

The primary determination required of this Court is whether or not the plaintiffs are attempting to establish an inconsistent or different cause of action arising out of the same occurrence. This Court must evaluate whether or not the plaintiffs are contradicting in the present action what was successfully alleged to be the truth in the prior litigation:

> When the estoppel is asserted in one judicial proceeding on the basis of a position taken in a prior proceeding, the labels are often blurred. There are cases in which the doctrine of collateral estoppel has been applied that seem more easily explained on the basis of the preclusion doctrine. And there are cases in which the preclusion doctrine is characterized as a breach of equitable estoppel. Many cases, however, have recognized that independent of res judicata, collateral estoppel, or equitable estoppel traditionally conceived, a litigant is not completely free to argue whatever state of facts seems advantageous at a point in time, and a contradictory state whenever self-interest may dictate a change. As it has been put in a number of

> cases, one may not play 'fast and losse' with the judicial process.

1B Moore's Federal Practice, ¶0.405[8] p. 239-40 (1984).

CONCLUSION

The plaintiff, Merilyn Butcher, through her complaint in the state court, alleged that Durbin was flying the airplane. More precisely, she alleged that Durbin, who had equal access to a fully functioning set of controls, intentionally performed an alleged illegal aerobatic maneuver in a negligent manner, which negligence, along with a lack of engine power as a result of the negligence of Gulf Park Aviation, Inc., combined to cause the crash.

The plaintiff, Martha Noble, in her state court lawsuit, alleged in the alternative that either Butcher or Durbin was piloting the airplane at the time of the crash. Although the plaintiff did not state precisely who was

piloting the plane, she did allege that whoever was manipulating the controls of the plane, intentionally performed an alleged illegal aerobatic maneuver in a negligent manner. Noble further alleged negligence against Gulf Park Aviation, Inc. for essentially the same reasons as Butcher.

The plaintiff, Carolyn Durbin, at all times contended that the accident occurred as a result of the negligence of Butcher and included an allegation of negligence against Gulf Park Aviation, Inc., similar to Butcher and Noble.

Needless to say, we are extremely concerned with the disparity between the allegations made in state court and federal court. It is our impression that the key to deciding the present motions is to determine what effect the state court allegations of negligence on the part of the pilot and Gulf

Park Aviation, Inc. have on the federal court allegations of negligence and/or strict liability against Cessna for an alleged manufacturing and/or design defect.

In each federal court complaint the plaintiffs fail to relate to us that in fact there were previous allegations of negligence or that there was a settlement based on those allegations.

Merilyn Butcher and Martha Noble now allege conclusively that the pilot was Lee Roy Butcher and that he was flying in a lawful and proper manner. Must we now assume that there was never any negligence on the part of the pilot or Gulf Park Aviation, Inc. as earlier alleged? Carolyn Durbin also conclusively states that Lee Roy Butcher was the pilot, and although her complaint fails to use the language "lawful and proper manner" when describing the actions of the pilot, she does

not relate to us any of the earlier allegations of negligence against the pilot or Gulf Park Aviation, Inc.

Do the plaintiffs now consider Cessna to be solely responsible for the accident? If so, do they plan to repay Ideal Mutual Insurance Company the settlement obtained as a result of those allegations. As we will soon conclude, the plaintiffs cannot have it both ways.

It is evident that at no time did any of the plaintiffs allege anything but negligence in the state court actions. With the guidance of Coral Drilling and O'Briant, this Court must first determine if an adequate election of remedies has been made. In the state court actions, all of the plaintiffs individually compromised and settled their respective lawsuits against the defendant, Gulf Park Aviation, Inc., by and through its insurance

carrier, Ideal Mutual Insurance Company. Such a compromise and settlement has been determined to be sufficient to give rise to the election of remedies analysis. Coral Drilling, 260 So.2d at 463.

Continuing, we must next consider if one action alleges what the other denies and whether the facts necessary to support one remedy are inconsistent with those necessary to support the other. O'Briant, 208 So.2d at 787. Because the present suits fail to incorporate the once alleged negligence of the pilot, now set forth as being Butcher, and because the present actions fail to make reference to the previously alleged negligence of Gulf Park Aviation, Inc., we are of the opinion that there is a current denial of negligence on the part of any of the defendants to the prior actions. This clearly is an inconsistency when one considers that

the allegations now are directed solely at Cessna. We must then ask, is this the type of inconsistency which necessarily requires the denial of previously alleged facts as contemplated by the authorities?

Relating the course of events in the instant action to Coral Drilling, Cessna contends that the plaintiffs alleged a single-accident -- the impact of an airplane with the ground resulting in a single set of damages -- the alleged wrongful deaths of their husbands. Cessna further argues that the plaintiffs' first allegations, that the accident occurred because of the negligence of the pilot and the improper maintenance of the airplane, was the "red truck". Cessna contends that those allegations which resulted in separate settlements preclude the plaintiffs from asserting that the "blue truck", the slippage of Butcher's seat when

Butcher was flying the plane, caused the accident and damage, for which they have already recovered.

We are of the opinion that Cessna's reliance and interpretation of Coral Drilling is well founded. The present actions, not unlike the subsequent suit in Coral Drilling, attempt to allege inconsistent facts which necessarily deny the facts earlier plead and on which a settlement was obtained. It is our opinion that either the accident occurred because of the negligence of the pilot and/or the negligence of Gulf Park Aviation, Inc. or because the seat in which the pilot was riding defectively slipped back so as to make the pilot lose control. The acts are such that either the accident occurred one way or the other. To allege in the present actions negligence and/or strict liability in tort

against Cessna is to deny the negligence earlier alleged and settled upon.

We are of the opinion that the plaintiffs' reliance in the cited case law is not supportive to their position. In Banes, election of remedies and judicial estoppel were not applicable, first, because the initial suit against Thompson had not been reduced to judgment or settlement, and second, because the plaintiff did not change her assertions of fact between trials. It is our opinion that had the plaintiff in Banes alleged that the accident happened one way in the first lawsuit and thereafter obtained recovery by way of judgment or settlement and then attempted to make a recovery against a different party, on the basis of different facts, the case would be consistent with the instant action. Had such occurred, there is no doubt that the doctrines of election of

remedies and judicial estoppel would have been applied to bar the plaintiff from making inconsistent legal theories.

By the use of Junkins, the plaintiffs attempt to persuade us that with respect to joint tortfeasors they can be sued either jointly, severally, collectively or individually. With that we have no problem. However, nothing in Jukins would authorize the plaintiffs in this action to recover by way of settlement based on one set of facts and then maintain another action against a different party based on a totally different set of facts alleged to have cause the same damages.

In acknowledging, the possibility of being overly repetitive, we cannot help but re-emphasize that the federal court lawsuits describe different facts relating to the same damages. In the state court suits the plaintiffs alleged that the pilot negligently

piloted the airplane and crashed because of his unsuccessful completion of an allegedly illegal aerobatic maneuver complicated by the negligent maintenance of the airplane by Gulf Park Aviation, Inc. and now the plaintiffs propose that: (1) Butcher was the pilot; (2) he was not negligent; (3) he did not perform an alleged illegal aerobatic maneuver, (4) Gulf Park Aviation, Inc. did not negligently maintain the airplane; and (5) the airplane crashed because Butcher was unable to manipulate the controls because his seat had slipped back. We are of the opinion that although one may pursue joint tortfeasors separately, one may not pursue one party on one set of facts and after obtaining a recovery based on those facts, assert a claim for the same damages against one who was not a party to the first action in a subsequent

action which in doing so denies the allegations of the first action.

Having decided that the doctrines of judicial estoppel and election of remedies effectively bar the plaintiffs' cause of action, we must now consider whether the plaintiffs' knowledge of the facts and circumstances at the time of filing and subsequently settling of the state court lawsuits should or should not be considered irrevocable. The plaintiffs rely on Anaconda Aluminum Co. v. Sharp, 243 Miss. 9, 136 So.2d 585. 590 (1962), in arguing that:

> ... if a litigant commences a suit, action or proceeding in ignorance of the substantial facts which offer an alternate remedy, he may, when informed adopt a different remedy.

The plaintiffs also direct our attention to Guy James Construction Company v. Trinity Industries, Inc., 644 F.2d 525, 530 (5th Cir. 1981), wherein it was determined that:

> Such a pleading (a complaint) will not amount to an election 'unless the choice is made with a full and clear understanding of the problem, facts and remedies essential to the exercise of an intelligent choice'.... It was only upon extensive subsequent discovery that Trinity was found to have violated the manufacturing specifications, and a second amended complaint was, accordingly, filed.... Although James' settlement with DFW may have partially satisfied damages resulting from the delay, the evidence clearly supports James' argument that the settlement agreements were executed in contemplation of various other unrelated claims. The election doctrine will not bar suit when a settlement for less than the stated claim is based upon uncertain and undetermined facts.

We note from the record of the state court actions that there was thorough discovery performed by the parties as permitted by the Mississippi Rules of Civil Procedure. It has been established that the plaintiffs, collectively, designated no less than three (3) expert witnesses who were expected to testify that the pilot and/or Gulf

Park Aviation, Inc. were negligent and that such negligence was the sole, proximate cause of the accident. Moreover, Merilyn Butcher, at one point, designated as expert witnesses Jesse Stoneciper and Joe Snodgrass; Mr. Stoneciper to testify as to the negligence of the pilot, and Mr. Snodgrass to testify to the negligence of Gulf Park Aviation, Inc. Each of the experts' testimony was to have been based on the personal examination of the wreckage and the observation of the instruments.

The plaintiffs agree that there was extensive discovery but argue that because there was a state of dispute as to who was piloting the plane and what caused the crash, the parties agreed to settle the actions. We have some trouble following that logic. Surely the plaintiffs are not asserting that they filed a lawsuit without having enough

information to know who to proceed against. It has been our experience that one does not just choose a defendant at random and make unsubstantiated allegations of negligence. We do not agree that the plaintiffs did not have the knowledge to make an informed decision concerning Cessna.

Concerning ourselves with Anaconda and Guy Jones Construction, we do not think that those cases adequately support the plaintiffs' position.

In Anaconda there can be found no support that a party may make a settlement based on one set of facts and then pursue another party on the basis of inconsistent facts. Anaconda merely authorizes a change in legal theory once litigation brings to light a previously unknown legal theory.

In Guy Jones Construction Co., there was only one lawsuit in which James alleged that

the Airport Board, Trinity, and various subcontractors caused it to sustain damage for the late completion of a contract for the construction of bridges. All of the defendants, except Trinity, settled, and the case was tried against Trinity only. From an award of damages to James, Trinity claimed on appeal that James was barred from maintaining a suit against it because of the doctrine of election of remedies. The Fifth Circuit rejected the claim because Trinity did not plead the defense prior to trial. The Court also held that James was not alleging inconsistent and totally contradictory facts, and that the election of remedies doctrine is not applicable in Texas where a settlement for less than the stated claim is based upon uncertain and undetermined facts. In the plaintiffs' state court litigation, no one suggested seat slippage. The facts were

neither uncertain no undetermined, as evidenced by Answers to Interrogatories and affidavits from experts. The plaintiffs made no effort to bring Cessna into the earlier litigation; they merely took $75,000.00 each, on the basis of the allegations made in that suit and then brought a separate action against Cessna on acts that require the denial of the facts earlier alleged.

For the above stated reasons, we think that adequate discovery was had in the prior litigation wherein any and all viable remedies should have been uncovered. We do think that the plaintiffs lacked the knowledge to make an informed choice in obtaining a settlement of their claims and as a result thereof, we hold that the decision to proceed without Cessna was irrevocable. We cannot see how the present actions are distinguishable in legal theory or spirit from the controlling

authority of Coral Drilling and O'Briant and for these reasons Cessna's separate motions for summary judgment against Merilyn Butcher, Martha Noble and Carolyn Durbin are hereby granted.

APPENDIX C

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before

the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall

if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts

thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit

facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State

(1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, The Summary Judgment (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

1946 AMENDMENT

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in Peoples Bank v. Federal Reserve Bank of San Francisco, Cal.1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least

20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See United States v. Adler's Creamery, Inc., C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in Sartor v. Arkansas Natural Gas Corp., 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed. Rules Serv. 974; Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character,

and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See Leonard v. Socony-Vacuum Oil Co., C.C.A.7,

1942, 130 F.2d 535; Biggins v. Oltmer Iron Works, C.C.A.7, 1946, 154 F.2d 214; 3 Moore's Federal Practice, 1938, 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, Leonard v. Socony-Vacuum Oil Co., supra. See also Audi-Vision, Inc. v. RCA Mfg. Co., C.C.A.2, 1943, 136 F.2d 621; Toomey v. Toomey, App.D.C. 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; Biggins v. Oltmer Iron Works, supra; Catlin v. United States, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 AMENDMENT

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see

3 Barron & Holtzoff, Federal Practice & Procedure 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary

matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See Frederick Hart & Co., Inc. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948); United States ex rel. Kolton v. Halpern, 260 F.2d 590 (3d Cir. 1958); United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc., 191 F.Supp. 383 (D.Del. 1961); Jamison v. Pennsylvania Salt Mfg. Co., 22 F.R.D. 238 (W.D.Pa. 1958); Bunny Bear, Inc. v. Dennis Mitchell Industries, 139 F.Supp. 542 (E.D.Pa. 1956); Levy v. Equitable Life Assur. Society, 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

APPENDIX D

Merilyn W. BUTCHER,
Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY
Defendant-Appellee.

Martha J. NOBLE, Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY
Defendant-Appellee.

No. 87-4823

United States Court of Appeals,
Fifth Circuit.

July 27, 1988.

Appeal from the United States District Court for the Southern District of Mississippi.

Before Politz and Johnson, Circuit Judges, and Boyle, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiffs-appellants the cost on appeal, to be taxed by the Clerk of this Court.

ISSUED AS MANDATE. (Sept. 8, 1988)

Merilyn W. BUTCHER,
Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,
Defendant-Appellee.

Martha J. NOBLE, Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,
Defendant-Appellee.

Carolyn S. DURBIN,
Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING
(August 29, 1988)

Before POLITZ AND JOHNSON, Circuit Judges, and

BOYLE* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT. 8-24-88

* District Judge of the Eastern District of Louisiana, sitting by designation.

(2)

No. 88-1149

Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

CESSNA AIRCRAFT COMPANY

Petitioner,

v.

MERILYN W. BUTCHER, MARTHA J. NOBLE, CAROLYN S. DURBIN

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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16 pp

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No. 88-1149

In The

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October Term, 1988

CESSNA AIRCRAFT COMPANY

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent sets forth supplemental facts in this case due to their omission in the Petition for Writ of Certiorari and their importance to this Court's consideration of the issues raised.

Petitioner, Cessna, filed its Motion for Summary Judgment in this case and attached to each Motion numerous exhibits. Included in the exhibits were the entire text of the depositions of the three widows, Butcher, Noble, and Durbin. In her deposition Mrs. Butcher testified that she was not aware of the potential of any lawsuit against Cessna Aircraft Company until

after the state court lawsuits were filed. (R. 3, 852, 853, 860-863). Carolyn Sue Durbin testified in her deposition that at the time of the filing of three State Court lawsuits:

> "As far as we knew, we really, I think at this point, we really didn't know quite what had happened. . . . We knew that there was an accident and we knew that . . . there was probably a reason, and there had to be a reason for it, but we just really didn't know what the reason was. At the time we just kind of probably trying to find out." (R. 11, 221).

It was only after the aircraft seat tracks were obtained and an expert opinion was rendered that Mrs. Durbin and her attorney concluded that the cause of the crash was the seat slippage (R. 11, 222-226). Mrs. Noble testified that at the time the Complaint was filed in the State Court lawsuit, she did not know why the plane had crashed. (R. 8, 411, 412). She further testified that at the time the State Court lawsuit was settled, it was decided to pursue a products liability action against Cessna. (R. 8, 414). She testified that her attorney made the decision to Sue Cessna. (R. 8, 415).

When the Court filed its Joint Memorandum Opinion, the three Plaintiffs filed a Motion to Reconsider based on the fact that the Court had made an erroneous fact finding that they knew of the liability of Cessna at the time the State Court actions were filed. (R. 4, 1204). The Motion for Reconsideration pointed out to the Court that there was no evidence to support this fact finding. In a further effort to clarify the issue, affidavits of the attorneys for each of the three Plaintiffs were submitted along with the Covenants Not to Sue and Indemnity Agreements. The affidavits and documents clearly demonstrated that the widows were not aware of Cessna's

liability based on the seat defect at the time the State Court lawsuits were filed. This knowledge was gained only during discovery which included locating the seat tracks and employing an expert to examine them and express an opinion that the seat defect and resulting slippage caused the crash. (R. 4, 1210, 1221). The affidavits pointed out that as part of the settlement, the Plaintiffs reserved their rights against Cessna and that the liability carrier of Gulf Park Aviation, Ideal Mutual, was to share in any eventual recovery against Cessna in the products liability suit. The Court refused to consider the affidavits and overruled the Motion to Reconsider. (R. 6, 1928-1930).

SUMMARY OF THE ARGUMENT

Petitioner cites cases decided by the various Circuit Courts of Appeal and argues that these cases represent conflicting decisions. Petitioner argues that this Court should grant Certiorari to bring uniformity and finality to Rule 56 F.R.C.P. However, the cases cited by Petitioner as representing conflicting decisions to the Fifth Circuit decision herein and those in other Circuits, are clearly distinguishable from this case. All of these cases dealt with either factual or legal issues, raised for the first time before the Courts of Appeal. The factual issue of the knowledge of the widows necessary for an informed election of remedies, was before the trial Court in the depositions of the widows attached to Cessna's Motion for Summary Judgment. Moreover, following the Court's ruling, Respondents timely filed Petitions for Reconsideration, attaching affidavits from attorney's for the

widows in the state Court actions. These affidavits clearly presented material issues of disputed fact as to the widows knowledge of Cessna's liability at the time the state actions were filed and demonstrated an election to proceed against Cessna at the time the state court's actions were dismissed. The trial Court considered these affidavits in it erroneous decision to reaffirm its grant of Summary Judgment. Petitioners underlying basis for petitioning for Certiorari is, therefore, unsound.

REASONS FOR NOT GRANTING THE WRIT

I.

THE LINE OF CASES CITED BY PETITIONER AS DEMONSTRATING AN ALLEGED CONFLICT AMONG THE CIRCUITS, DO NOT APPLY TO THE FACTS OF THIS CASE.

In an effort to justify its application for Certiorari, Petitioner attempts to demonstrate a conflict amongst the various Federal Courts of Appeal. However, assuming for purposes of argument that there is any such conflict, the facts of this case are distinguishable from the facts of the line of cases cited by Petitioner as being in conflict with the Fifth Circuit's decision in this case. All of the decisions cited by petitioner from the First Circuit, Third Circuit, District of Columbia, and Seventh Circuit Courts as conflicting with the Fifth Circuit opinion in this case, deal with either facts which are presented for the first time to the Court of Appeals or to legal issues raised for the first time in the Court of Appeals. This case is clearly distinguishable because the testimony demonstrating the disputed issues of material fact was clearly before the

trial Court in the form of the deposition of the three widows. In addition, the trial Court had ample opportunity to deliberate the impact of the affidavits of Plaintiff's attorneys and attached exhibits prior to refusing to reconsider its granting of the Motion. As shown by the trial Court's Joint Memorandum Order, it clearly was aware of the content and issues raised by the affidavits. (R. 9, p. 811, 813).

The inapplicability of the line of cases cited by petitioner is vividly demonstrated by its citing the case of *Sound Shipbuilding Corporation v. Bethlehem Steel Company,* 533 F.2d 96 (C.A. 3rd 1976). On Page 7 the Petitioner states that the *Sound Shipbuilding* case is "a case much like the present one where a Plaintiff attached affidavits to its petition for rehearing." The Petition for Rehearing in that case was filed with the Circuit Court of Appeals and the affidavits were filed in support of the Petition for Rehearing in that case. The facts of that case are grossly distinguishable from this one where Plaintiffs filed their affidavits and exhibits with the District Court and the District Court examined and considered the affidavits and exhibits in making its ruling.

The *Voutour v. Vitale* case, 761 F. 2d 812 (C.A. 1st, 1985) cert. den. 474 U.S. 1160, (1986) relied upon by Petitioners is also clearly distinguishable. In *Vortour,* the District Court ruled on a Summary Judgment 1 year prior to trial. On Appeal the Summary Judgment was attacked based on facts presented for the first time at trial. Here, immediately following the court's ruling, the District Court was apprised of the factual issue it had assumed was undisputed.

Cessna attacks the affidavits of the attorneys on the grounds that attorneys' affidavits are not proper evidence in support of the motion. However, the cases cited by Petitioner as refusing to consider attorneys' affidavits do so on the grounds that under Rule 56(e) of the Federal Rules of Civil Procedure, the affidavits must be based on personal knowledge of the affiant.

Moore's On Federal Practice states:

> "Any attorney does, however, have the right to submit his own affidavit when he is competent to testify to facts within his personal knowledge." §56.22 [1] "Form and Content of Affidavit; Further Testimony," at p. 56, 1320-1321.

In a case that also involved the question of the terms of a settlement, attorney's affidavits were admitted in support of such facts. *Lockwood v. Wolfe Corporation, Inc.*, 629 F.2d 603 (C.A. 9th, 1980). To hold otherwise, would deprive a party of the testimony of the person most knowledgable of the terms and background of the settlement documents.

Cessna argues that the Court of Appeals improperly relied on "widow's affidavits" which are not in the record. It is clear from a reading of the entire paragraph quoted by Cessna, that the Court of Appeals was referring to the widow's attorneys' affidavits. (Appendix A, to Petitioners' Brief p. 13).

The District Court clearly had before it competent evidence sufficient to withstand Petitioner's Motion for Summary Judgment.

II.

THE *CELOTEX* CASE IS INAPPLICABLE WHERE THE EXHIBITS SUBMITTED BY MOVANT IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT DEMONSTRATE THE EXISTENCE OF A DISPUTED MATERIAL FACT ISSUE.

Petitioner's reliance upon this Court's decision in the case of *Celotex Corporation v. Catrett*, 477 U.S. 317, (1986), is misplaced. Petitioner argues that Respondent merely presented the Response to Itemization of Facts Relied upon by Cessna and a brief in opposition to its Summary Judgment. It is first pointed out that, this case is distinguishable from *Celotex* on the basis that, in *Celotex* the nonmoving party bore the burden of proof at trial as to a dispositive issue. In this case Cessna, the movant, bore the burden of proof as to its affirmative defenses of election of remedies or judicial estoppel. The nonmovant is not required to produce additional evidence where the depositions and other exhibits submitted by the movant in support of the Motion demonstrate the existence of a material issue of disputed fact. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S. Ct. 1575, 20 L.Ed. 2d 569 (1960), *Kirk v. Home Indemnity Company*, 431 F.2d 554 (C.A. 7th 1970). Petitioner's reliance upon *Celotex* is, therefore misplaced.

Finally, it should be recognized, that it was Petitioner's own failure to comply the local Court rules which resulted in the error of the District Court. It was Cessna's duty under Rule 8(d) of the United States District Court for the Southern District of Mississippi to specifically itemize the facts upon which it relied in support of the Motion for Summary Judgment and as to

which there was no dispute in a written pleading. Local Rule 8(d) (Copy attached hereto).

An obvious purpose of this rule is to determine whether the identified undisputed facts, as a matter of law, constitute grounds for Summary Judgment. Cessna, bearing the burden of proof on its affirmative defense, had the duty under Local Rule 8(d), to itemize the specific undisputed facts which allowed it to invoke the doctrines of judicial estoppel or election of remedies.

> "Thus if the movant bears the burden of proof on an issue, either because he is the Plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the asserted elements of the claim or defense to warrant judgment in his favor. *Fontenot v. Upjohn*, 780 F.2d, 1190, (C.A. 5th 1986) at p. 1194.

Cessna did not provide affidavits with specific factual allegations in support of its Motion, but attached a two inch volume of exhibits containing various depositions, pleadings and other materials. Cessna made no designations as to what specific portions of its exhibits it was relying upon. In its itemization of undisputed facts upon which it relied, Cessna presented no facts upon which it could be concluded or inferred that (a) Plaintiff knew of their causes of action against Cessna at the time the State Court suits were filed, and (b) the later settlement of these actions and the Declaratory Judgment action was a conscious election not to sue Cessna. (R. 3, p. 1097, R. 7 p. 653, R. 10, p. 432). Since Cessna failed to comply with the local rule and identify these facts as undisputed and relied upon in the Motion, Plaintiffs were not called upon to rebut them with any proof. When the Court improperly made fact findings on these issues in

its opinion, Plaintiff's counsel filed the Motion for Reconsideration with the attorneys' affidavits and exhibits attached to advise the Court that its fact findings were not supported by the Record and incorrect. Cessna having failed in its initial burden to identify the specific facts upon which it relied in support of its Motion for Summary Judgment based upon its affirmative defense, was responsible for inducing the error of the trial Court. There is no sound policy reason why Cessna's lawyers should be "rewarded for less than diligent work." (Petitioner Brief, p. 11).

CONCLUSION

For the foregoing reasons Cessna's Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Rule 8. Motion Practice

(a) **Applicability.** The provisions of this rule apply to all written motions filed in civil actions.

(b) **Filing; Proposed Orders.** The original of each motion, and all affidavits and other supporting documents shall be filed with the Clerk at the division office where the action is docketed. The moving party at the same time shall mail a copy thereof to the Judge presiding in the action at his home office mailing address, or, if the motion is referred to a Magistrate, to the Magistrate at his home office mailing address.

A proposed order shall accompany the court's copy of any motion which may be heard *ex parte* or is to be granted by consent. If the motion is referred to a Magistrate, the proposed order shall be furnished to the Magistrate with a copy of the motion.

(c) **Responses.** The original of any response to the motion, all opposing affidavits, and other supporting documents shall be filed with the Clerk at the division office where the action is docketed and any response to the motion and all objections shall be filed and copies distributed as provided in Paragraph (b) of this rule.

(d) **Memoranda; Documents Required With Motions to Dismiss or for Summary Judgments; Failure to Submit Required Documents.** At the time the motion is served, other than motions or applications which may be heard *ex parte* or those involving necessitous or urgent matters, counsel for movant shall mail to the Judge or Magistrate in charge of the case the original and one copy

of a memorandum of authorities upon which he relies. Counsel for respondent shall submit the original and one copy of a memorandum of authorities in reply, and shall do so within ten (10) days after service of movant's memorandum. Counsel for movant desiring to submit a rebuttal memorandum may do so within five (5) days after the service of the respondent's memorandum. Any requests for extension of time shall be made in writing to the Judge or Magistrate before whom the motion is noticed. Memoranda submitted in connection with any dispositive motion shall be accompanied by separate proposed findings and conclusions. In all motions for summary judgment the movant must file with the Clerk as a part of the motion an itemization of the facts relied upon in support of the motion which he claims to be both material and as to which there is no genuine issue. The respondent shall either agree that the facts listed by the movant are undisputed or shall state with specificity those facts which are contested and the reasons therefore. In the event of cross-motions for summary judgment in which the parties agree on the facts, the parties shall file a stipulation of uncontested facts. Motions to dismiss and for summary judgment shall also be accompanied by copies of the complaint and, if an answer has been served, the answer. Counsel shall strictly comply with the requirements of Rule 6(c) in connection with motions to compel discovery. Failure to timely submit the required motion documents may result in the denial of the motion and/or the imposition of appropriate sanctions.

(e) **Length of Memoranda.** Movant's original and rebuttal memoranda together shall not exceed a total of thirty-five (35) pages, and respondent's memorandum

shall not exceed thirty-five (35) pages, Memoranda and other submissions required by Paragraph (d), except as therein provided, are not to be filed with the Clerk's office.

(f) **Notice and Hearings.** All motions in which a hearing is requested shall be noticed for hearing "as soon as counsel can be heard" but no date certain shall be set by the moving party.

All motions shall be decided by the Court without a hearing or oral argument unless otherwise ordered by the Court on its own motion, or, in its discretion, upon written request made by counsel in an easily discernible manner on the face of the emotion or response.

The scheduling of an evidentiary hearing or oral argument, where allowed, shall be set at such time and place as may suit the convenience of the Judge or Magistrate assigned to the case. The Court may, in its discretion, hear oral argument by telephone conference.

(h) **Service.** Movant and respondent shall serve copies of all motions, responses, and/or memoranda upon opposing counsel. When service is by mail, three (3) days shall be added to the periods prescribed in Paragraph (d) of this rule.

(i) **Role of the Magistrate.** All pretrial motions are hereby referred to a Magistrate for hearing and determination in accordance with the provisions of Rule 74, FRCP, with the exception of motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can

be granted, to involuntarily dismiss an action, motions in limine regarding evidentiary matters, and for extensions of time with regard to matters pending before a District Judge. Upon entry of a Pretrial Order, all motions thereafter served shall be submitted to the assigned trial judge.

(l) **Untimely Motions.** Any motion served beyond the motion deadline imposed in the Scheduling Order entered pursuant to Rule 6(d), with the exception of in limine evidentiary motions, may be denied solely because the motion is served untimely.

(m) **Sanctions – Frivolous Motions or Opposition.** A patently frivolous motion or opposition to a motion on patently frivolous grounds may result in the imposition of appropriate sanctions, including the assessment of costs and attorney's fees.